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IN THE

Supreme Court of the United States

October Term, 1964

No. 850

CONTINENTAL GRAIN COMPANY,
Petitioner,

vs.

CITY OF BUFFALO, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT MIDLAND STEAMSHIP LINE, INC. IN OPPOSITION

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THE JUDSON-BROOKS COMPANY—CLEVELAND

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I.

Counter Statement of Question Presented

Respondent Midland was entitled to exoneration from liability.

The District Court and Court of Appeals properly found that, as a matter of fact, the presence of the Tewksbury's shipkeeper could not have averted the collision with the Shiras nor the striking of the bridge which followed.

II.

Counter Statement of the Case

While petitioner charges many assignments of error with respect to other respondents, the error as to Midland is limited to the factual proposition that, had the shipkeeper of the Tewksbury been on board the Tewksbury when the Shiras collided with her, the disaster which followed would have been averted.

On this specific issue no question of law is presented for consideration by this Court. The resolution of the questions of fact was concurred in by both the District Court and the Court of Appeals.

The District Court found as follows:

> "When the Shiras collided with the Tewksbury, the Tewksbury was securely moored to the Standard Elevator dock. It was not an exposed dock, such as the one where the Shiras was moored. * * * Her mooring lines were sufficient, adequate, and in good condition. She was flush against the face of the dock for her full length. There was no opportunity for ice, current and debris to build up between her port side and the dock. This was a relatively protected area of the river. The water was deep enough to permit the Tewksbury to moor at the dock without danger of resting on the bottom. Under the circumstances of such a mooring, there was no necessity, in the exercise of reasonable care, to put out anchors or anchor chains." (R. Vol. V, pp. 3312-3313).

> "The Tewksbury was not required to anticipate, nor to provide against the Shiras breaking loose from her moorings and coming in contact with the Tewksbury. She took reasonable precautions for the safety of the moored vessel. None of the alleged faults of the Tewksbury were contributing causes of the disaster at the bridge, or of

the damage occasioned to other vessels before the bridge disaster. The Tewksbury had a competent and experienced shipkeeper. Due diligence and care was exercised in his selection. He had gone ashore at about 5 P.M. and did not return to the vessel until after the disaster. *His presence as shipkeeper aboard the Tewksbury could not have averted the collision with the Shiras, nor the striking of the bridge, which followed.*" (R. Vol. V, page 3313). (Emphasis supplied.)

The Court of Appeals sustained the District Court on the above findings as follows:

"The exoneration of the Tewksbury and of her owner is challenged by the argument that the Tewksbury should have put out an anchor and an anchor chain and that it was negligent for her shipkeeper to be away. As to the former we see no sufficient reason to reject the judge's conclusion that, in view of the Tewksbury's sheltered position, the omission to take these added precautions, even in the conditions that had developed on January 21, was not negligent."

"* * * *But we accept the judge's conclusion that the shipkeeper's presence would not have averted the disaster.* The only ameliorative measure which it is suggested he might have taken is the dropping of the one anchor left to the Tewksbury after the Shiras destroyed the other. But it is highly questionable whether such action would have had a significant effect on the short rock-bottomed stretch between the Standard Elevator and the bridge. See *The Anna C. Minch*, 260 Fed. 522, 527 (WD NY), 271 Fed. 192, 198 (2 Cir. 1921). Moreover, the shipkeeper might well have been reasonably reluctant to drop an anchor knowing that if it held, the Shiras would crash into the Tewksbury again." (Petition of Continental Grain Co., Appendix A., pages 40, 41). (Emphasis supplied).

III.

ARGUMENT

Respondent Midland was entitled to exoneration from liability.

> The District Court and Court of Appeals properly found that, as a matter of fact, the presence of the Tewksbury's shipkeeper could not have averted the collision with the Shiras nor the striking of the bridge which followed.

Petitioner's statement on page 18 of its petition as to the substance of the holding of the Court of Appeals is inaccurate. The Court of Appeals did not say that

> "* * * the presence of her shipkeeper on board and his dropping her remaining anchor *might not* have had a significant effect."

What the Court of Appeals did say was,

> "The only ameliorative measure which it is suggested he might have taken is the dropping of the one anchor left to the Tewksbury after the Shiras destroyed the other. But it is highly questionable whether such action would have had a significant effect on the *short rock-bottomed stretch* between the Standard Elevator and the bridge. See *The Anna C. Minch*, 260 Fed. 522, 527 (WD NY) 271 Fed. 192, 198 (2 Cir. 1921)." (Emphasis supplied).

It is significant also that the Court of Appeals concluded with the statement:

> "Moreover, the shipkeeper might well have been reasonably reluctant to drop an anchor knowing that if it held, the Shiras would crash into the Tewksbury again."

Although academic, exception is taken to the petitioner's argument that it was incumbent on Midland to prove that the shipkeeper's presence aboard ship and the dropping of the anchor could not have had some effect and averted the disaster. This is precisely what Midland did prove and the District Court and the Court of Appeals from the weight of the evidence have so found.

Concurrent findings of fact by two lower courts, as in this instance, will be accepted by the Supreme Court where no adequate reason appears for challenging the correctness of such findings and there is no very exceptional showing of error. *Comstock v. Group of Institutional Investors, et al.*, 335 U.S. 211 (1948), *Luckenbach v. McCahan Sugar Co.*, 248 U.S. 139 (1918). Petitioner has failed to show any adequate reason or exceptional error as to why the findings of fact of both Courts below on this issue should be disturbed. In fact, its petition is devoid of reference to any facts whatever.

The petition for writ of certiorari as to the issue whether respondent Midland was entitled to exoneration should be denied.

IV.

Conclusion.

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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